Nos. 87-470 and 87-614

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FORT WAYNE BOOKS, INC.,

Petitioner,

v.

STATE OF INDIANA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

RONALD W. SAPPENFIELD, ET AL.,

Petitioners,

v.

STATE OF INDIANA

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA, FIRST DISTRICT

BRIEF OF MORALITY IN MEDIA, INC. AS *AMICUS CURIAE*

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INTEREST OF AMICI

Morality In Media, Inc., as Amicus Curiae, files this brief in this case which is before this honorable Court on the merits, under the provisions of Rule 42(2). The written consents of the petitioners and respondents have been requested and all parties have consented in writing. Copies of these consents are being filed with this Court concurrently with this brief.

Morality In Media is a New York not-for-profit, interfaith, charitable corporation, organized in 1968 for the purpose of combatting the distribution of obscene material in the United States. This organization, now national in scope, has affiliates in six states and Puerto Rico. Its Board of Directors and National Advisory Board are composed of prominent businessmen, clergy and civic leaders. Its national headquarters is located at 475 Riverside Drive, New York, New York 10115.

The Founder and President of Morality In Media (until his death in 1985) was Reverend Morton A. Hill, S.J. In 1968, Father Hill was appointed to the Presidential Commission on Obscenity and Pornography. He, along with Doctor Winfrey C. Link, produced the "Hill-Link Minority Report of the Presidential Commission on Obscenity and Pornography." The "Hill-Link Minority Report" was cited by this honorable Court in Kaplan v. California, 413 U.S. 115, 120 note 4 (1973) and in Paris Adult Theatre I v. Slaton, 413 U.S. 49 at 58, notes 7 and 8 (1973).

More recently Morality In Media has participated as Amicus in Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726 (1978); New York v. Ferber, 458 U. S. 747 (1982) and Brockett v. Spokane Arcades, Inc., 105 S.Ct. 2794 (1985).

Morality In Media is filing a brief in this matter because it believes that the decision in these cases will have a direct effect not only

on state RICO statutes but on the Federal RICO statute to which the crime of dealing in obscene matter was added in 1984 as a predicate crime at the request of Morality In Media. The recent case of United States v. Pryba, 674 F.Supp. at 1504 (E.D. Va. 1987) upheld the new federal obscenity RICO law.

It is the belief of Morality In Media that its brief contains arguments that will not be advanced by the parties.

SUMMARY OF ARGUMENT

Morality In Media contends that the mere fact that the "enterprise" involves a so-called "First Amendment Business" which can under Indiana law be forfeited or dissolved does not invalidate RICO laws that include obscenity as a predicate offense. If this were not the law, then a criminal's so-called "First Amendment" business and corporation would be insulated from RICO laws entirely no matter what the predicate crime.[1] Morality In Media, Inc. contends that a sole proprietor of a "First Amendment" business can be incarcerated for long periods of time under existing Federal and State obscenity laws effectively precluding him or her from

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1. This honorable Court denied certiorari at 459 U.S. 825 (1982) to United States v. Thevis, 474 F. Supp. 134 (N.D. Ga. 1979) aff'd. 665 F.2d 616 (11th Cir. 1982) where the enterprise had as its purpose a "pornography business."

engaging in that First Amendment business.[2] Amicus further points out that the RICO laws are on the books not as a restraint on future First Amendment activity but as a form of punishment for engaging in a past "pattern" of racketeering activity.[3] Amicus further demonstrates that analogous decisions of this Honorable Court may be viewed as precedents for upholding the Indiana RICO statute. Finally Amicus demonstrates the inapplicability of Vance, Marcus, Books, Freedman and Heller.

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2. Cf., Arcara v. Cloud Books, Inc. 106 S. Ct. 3172, 3177 (1986) where this Court said "A thief who is sent to prison might complain that his First Amendment right to speak in public places has been infringed."

3. Cf., State ex rel Kidwell v. U.S. Marketing, Inc., 631 P.2d 622 at 628, (Idaho Sup. Ct. 1981) appeal dismissed pursuant to Rule 53, 455 U.S. 1009 (1982).

ARGUMENT

I

THE INDIANA RICO LAWS DO NOT AMOUNT TO A PRIOR RESTAINT OF PROTECTED EXPRESSION ARE NOT OVERBROAD AND ARE NOT VIOLATIVE OF THE FOURTEENTH AMENDMENT.

The issue of the legality of a "prior restraint" reached this honorable Court in the landmark case of Near v. Minnesota, 283 U.S. 697 707-708 (1931). On that issue that Court said:

> "It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment.... In maintaining this guaranty, the authority of the State to enact laws to promote the health, safety, morals and general welfare of its people is necessarily admitted. The limits of the sovereign power must always be determined with appropriate regard to the particular subject of its exercise.... Liberty of speech, and of the press, is also not an absolute right, and the State may punish its

abuse."

The Court continues at 283 U.S. 713:

"In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication. The struggle in England, directed against the legislative power of the licenser, resulted in renunciation of the censorship of the press. The liberty deemed to be established was thus described by Blackstone:

'The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no <u>previous</u> restraints upon publication' (Emphasis Is The Court's) 'and <u>not in freedom from censure for criminal matter when published.</u>' (Emphasis Supplied). 'Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he

> publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity.'"

The Near Court continuing at 283 U.S. 714, 715 quotes Patterson v. Colorado,[4]

> 'The main purpose of such constitutional provisions is "to prevent all such previous restraints upon publications" as have been practiced by other governments" (Emphasis in Original) and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare.' (Emphasis Supplied).

The Court continues at 283 U.S. 716;

> "The protection even as to previous restraint is not absolutely unlimited...the primary requirements of decency may be enforced against obscene publications." (Emphasis Added).

It is interesting to note that Justice

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4. 205 U.S. 454 at 462 (1907).

Butler, with whom Justices Van Devanter, McReynolds and Sutherland concur[5] states that the majority opinion;

> "Seems to concede that under clause (a) of the Minnesota law the business of regularly publishing and circulating an obscene periodical may be enjoined as a nuisance."

It should be observed that the Indiana Rico law (34-4-30.5-2) permits the Court, after a defendant is found guilty of violating RICO, to:

(a) Require him to divest himself of any interest in the enterprise.
(b) Prohibit the defendant from engaging in the same type of endeavor.
(c) Dissolve or re-organize the enterprise.
(d) Order forfeiture of the charter.

Now none of these actions amount to a prior restraint, but are designed as punishment for

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5. 283 U.S. at 737.

past offenses. Contrary to the censorship decried in Near v. Minnesota there is no administrative or legislative[6] prior restraint upon any particular publication nor is there any particular subsequent restraint of any particular publication. What the Indiana law says is that "You, Mr. Defendant, (individual or corporation) may not engage further in this enterprise because you have prostituted it and turned it into a criminal activity." The statute, of course, as distinguished from the Near case situation, is "content neutral" relating to the predicate crimes which may trigger its remedies. It is not a statute that refers to the suppression of a newspaper or periodical, but "punishment in the ordinary sense" (cf., Near at 711 and 715). If we examine all of the Indiana civil RICO

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6. The dissenting Justices in Near argued that the doctrine of prior restraint, as it came to us from England and in the Blackstone quotation, supra, was restricted to Administrative prior restraint (283 U.S. 733).

remedies we find that in operation and effect no prior restraint is accomplished. The mere fact that the Defendant may be required to "divest" his interest or be "prohibited from engaging in the same type of endeavor" does not mean that one issue of a publication will be suppressed nor that the enterprise, if engaged in the distribution of publications, will miss a single sale. All that these provisions mean is that some one else may own the enterprise and the assets and the means of publication or distribution--not that the public will be deprived of access to the sentiments therein expressed, (even incidently if the subsequent issue published or distributed is obscene). The same outcome would prevail if the enterprise were reorganized. If it were dissolved, the assets would be sold and publication could continue. The same, of course, is also true if the extreme remedy of charter forfeiture were invoked. It is noted that the statute requires

that the rights of all innocent persons involved in any way in or with the "enterprise" be protected.

The RICO statute also provides for forfeiture of property to the state as a punishment for RICO violations. Again, it should be noted, that the intent of the statute appears to be that except for property that has no value that the assets seized be sold to another party--In such a case the so-called "First Amendment" business may continue,albeit with different <u>persons</u> at the helm. We judge this to be the intent of Section 34-4-30-5.-3 by reason of the language "The court...shall specify the manner of disposition of the property including the manner of disposition <u>if the property is not transferable for value</u>" (Emphasis Added).

It goes without saying that the Criminal RICO provisions under 35-45-6.2 do not exert a prior restraint. It is the typical "after the fact" punishment that this honorable Court has

traditionally held not to be a prior restraint. In summary, the Civil and Criminal Indiana RICO laws are designed to and have the effect of "punishing people" not "putting a business out of businesss" especially if it can be utilized for legitimate purposes. Of course, items found in the RICO case to be obscene become contraband subject to destruction, but all of the balance of the "First Amendment" material is presumed to be nonobscene as well as all projectors, publication, printing and distribution facilities and may be sold or transferred to new "owners."

It is also significant to note that Near v. Minnesota majority opinion, as interpreted by the dissenting justices, apparently excepted enjoining a nuisance from the concept of prior restraint— "The business of regularly publishing and circulating an obscene periodical may be enjoined as a nuisance"[7]," Near also puts on a

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7. Note 5, supra

par "enforcing concepts of decency against obscene publications" with the right of the government "to prevent actual obstruction of its recruiting service or the publication of the sailing dates of transports or the number and location of troops."[8]

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8. 283 U.S. 716

II

WHERE SUFFICIENT REASON EXISTS THE CLOSURE OF A FIRST AMENDMENT BUSINESS HAS BEEN AUTHORIZED BY THIS HONORABLE COURT AND OTHER COURTS.

There is no legal principle established in law that prevents the closing of a so-called "First Amendment" business. The law does not surround such a business with an impregnable shield. The Fourteenth Amendment which provides that no state shall deprive any person of liberty without due process of law is not violated by a carefully tailored law designed to punish persons who abuse that liberty. As was said in Near v. Minnesota:

> "In maintaining this guaranty, the authority of the State to enact laws to promote the health, safety, morals and general welfare is necessarily admitted." (283 U.S. 707) "It is recognized that punishment for the abuse of the liberty afforded to the press is essential to the protection of the public." (Emphasis added) (283 U.S. 715).

In Arcara v. Cloud Books, Inc., 106 S.Ct. 3172, 3177 (1986) this honorable Court stated:

> "We must reject the Court of Appeals' reasoning, analogizing the closure order sought in this case to an unconstitutional prior restraint under Near v. Minnesota.... The closure order sought in this case differs from a prior restraint in two significant respects. First, the order would impose no restraint at all on the dissemination of particular materials, since respondent is free to carry on his bookselling business at another location even if such locations are difficult to find.[9] Second, the closure order sought would not be imposed on the basis of an advance determination that the distribution of particular materials is

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9. The implication of this honorable Court here is that the First Amendment is not offended even if it takes a while to find a new location. This argues for sustaining the Indiana RICO statute even though the transfer of the business to a new owner through the process of dissolution, reorganization or sale after forfeiture takes some time. This action was taken over the objection of the dissenting judges to the effect that "The Court improperly attempts to shift to the bookseller the responsibility of finding an alternative site" (106 S.Ct. 3180).

prohibited--indeed the imposition of the closure order has nothing to do with any expressive conduct at all."

There are similarities between Arcara and the cases at bar. Pending determination of the validity of the charges the defendants were free to carry on their adult book store activities at other locations especially if "new" money were utilized (except perhaps the fear that they might be arrested) but those arrests (either for obscenity or RICO violations) would not occur (or could be adequately defended) if the new locations avoided violating the law and in particular the Indiana Obscenity Law. The cases also fall squarely into the second Arcara test (which by itself is sufficient to rebut a claim of prior restraint) in that the seizure and forfeiture and the RICO statute are "content neutral" and the determination for seizure and forfeiture was not imposed "on the basis of an advance determination that the distribution of particular materials is

prohibited." As the Indiana Supreme Court said below; "It is irrelevant whether assets acquired through racketeering activity are obscene or not." (504 N.E.2d 564) (Emphasis Supplied).

We also draw the attention of the Court to Avenue Book Store v. City of Tallmadge[10] where this honorable Court denied certiorari to the Ohio Court of Appeals in 1981 over the stated objections of dissenting Justices. In that case, the Ohio Court of Appeals stated that:

> "Defendant is enjoined from utilizing the rear section of the store for the exhibition, display or sale of materials which display or depict sexual conduct (activity) that is obscene."

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10. 459 U.S. 997 (1982) . In Avenue Book the Ohio Court held that the injuction did not "carry with it any of the dangers of a censorship system." It said it did not constitute a prior restraint because" no punishment will be imposed until it is proven that obscene material was indeed involved." (459 U.S. at 997-998). (See also the outline of cases on both sides involving padlocking outlined in the Dissent in that case at 998-999).

Other cases involving First Amendment businesses where the state action was upheld include Art Theatre Guild, Inc. v. Ewing, 421 U.S. 923, 44 L.Ed.2d 82 (1975) dismissing an appeal from the Ohio Supreme Court 307 N.E.2d 911 (1974) ruling that a one year theatre closure provision was valid. The United States Supreme Court dismissed the appeal "For want of a substantial federal question."[11]

Young v. American Mini Theatres,[12] held that zoning laws on adult entertainment businesses do not constitute impermissible prior restraints noting that there is "No claim that...the viewing public is unable to satisfy its appetite for sexually explicit fare. ...the market for this commodity is essentially unrestrained."

There are lower court cases that

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11. Under Hicks v. Miranda, 422 U.S. 332 (1975) such a dismissal is a ruling "On the Merits."

12. 427 U.S. 50, 62 (1976).

recognize that "padlocking" of a motion picture theater is not an invidious prior restraint. A leading case is State ex rel Kidwell v. U.S. Marketing, Inc., 631 P.2d 622 (Idaho Supreme Court 1981) (appeal dismissed under Rule 53) 455 U.S. 1009 (1982). The opinion of the Idaho Supreme Court in that case, in which a one year padlock was imposed, is especially enlightening and applicable. The Court said at 631 P.2d 626:

> "The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test. ...What is needed is a pragmatic assessment of its operation in particular circumstances.... Kingsley Books v. Brown, 354 U.S. at 441-42."

Continuing at 627:

> "By way of example, if a bookseller, having fallen behind on his property taxes, loses his bookstore at a tax sale, he will not be heard to complain that the state has imposed an unlawful prior

> restraint on his bookselling activities. If that same bookseller is convicted of a crime of distributing obscene materials, he may be imprisoned, and yet he will not be heard to complain that his incarceration constitutes a prior restraint upon his ability to disseminate protected speech, even though it is quite clear that it will have that effect" (Emphasis Added).[13]

The Idaho Court continues at 627:

> "There are a number of distinctions between the Near case and the previously cited hypothetical examples, not the least of which is the fact that Near dealt with speech critical of public officials rather than speech of a sexual nature. Most significantly, however, the Near

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13. The point here is that while in "operation and effect" the incarceration deprives the defendant of the ability to conduct a First Amendment business, it is, in "operation and effect" not a restraint of First Amendment activities. It is a restraint on the defendant's participation therein. This distinction is dispositive of the present case.

injunction against prospective publication was based on the content of such publication" (Emphasis Added). "In the case of tax sales and imprisonment for violation of criminal obscenity statutes, the incidental restraint on future expression is not based on the content of that expression" (Emphasis Added).

At page 627, footnote 8, the Idaho court (citing cases) states:

> "The typical prior restraint case deals with the government's effort to censor future expression based on its content."

It then, at page 628, goes on to say;

> "The one-year forfeiture provision of the Idaho moral nuisance statute avoids the particular noxious specter of content control. Like a tax sale, the forfeiture is directed strictly against property, apart from the content of any expression contained therein. And like imprisonment for a criminal obscenity transgression, the forfeiture is intended to penalize

past distributions of illegal and unprotected obscenity. The legislature could just as easily have imposed a fine or other property-related penalty. Instead the legislature chose to punish the violator by temporarily depriving him of the property which was used in committing the violation."[14]

The Idaho Court, at page 628, then gives us the rationale for forfeiture statutes as follows:

"The purpose of statutory forfeitures is obvious: to punish and to deter...forfeitures punish 'by imposing an economic penalty thereby rendering illegal behavior

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14. "The state's authority to impose property related sanctions in civil actions is well-established...the most prevalent example of this type of in rem activity can be found in statutes imposing forfeitures upon vehicles and vessels used to transport contraband drugs.... Forfeiture is not limited to property used in drug crimes, however,...federal and state statutes reach virtually any type of property that might be used in the conduct of a criminal enterprise." (631 P.2d 628) (Emphasis Supplied).

unprofitable'.... This is the manifest purpose of Idaho's one year closing provision; not to prevent future expression, but to punish past illegal conduct by depriving the violator of economic gain. That is a permissible state objective, implemented by permissible means."

At page 629 the Idaho Court says:

"Our conclusion is based on the following: the extensive power of the state to impose a forfeiture on neutral and innocent property used in the commission of forbidden acts; the power of the state to impose sanctions of its choice upon those who disseminate unprotected obscenity; the fact that the forfeiture or closure order is not directed at speech or publication, but is instead aimed at the real property apart from the content of expression contained therein; and the fact that the defendants remain free to disseminate any materials except those already determined to be obscene, at

any other location, subject, of course, to further penal actions by the state should the defendants again violate laws regulating obscenity."

This plain and well-spoken rationale can be lifted wholesale and applied to the Indiana RICO law.

III

THE PROCEDURAL SAFEGUARDS OF FREEDMAN, OF HELLER, OF VANCE, OF MARCUS AND OF BOOKS DO NOT APPLY

As has been demonstrated, since there is no "prior restraint" of existing or future publications, then Freedman, Heller, Vance, Marcus and Books do not apply.[15]

There is no effort to censor existing or future expression based on its content.[16] As this honorable Court said "Every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities."[17] and "Bookselling in an establishment used for prostitution does not confer First Amendment coverage to defeat a valid statute aimed at

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15. Freedman v. Maryland, 380 U.S. 51 (1965); Heller v. New York, 413 U.S. 483 (1973); Vance v. Universal Amusement Co., 445 U.S. 308 (1980); Marcus v. Search Warrant, 367 U.S. 717 (1961); A Quantity of Books v. Kansas, 378 U.S. 205 (1968).

16. Cf., Vance v. Universal Amusement Co., 445 U.S. 308 (1980).

17. Arcara v. Cloud Books, Inc., 106 S.Ct. 3172, 3177.

penalizing and terminating illegal use of premises."[18] If we substitute the word "enterprise" or "corporate charter" for premises in the above quotation we have, in essence, set forth the governmental justification for RICO statutes.

It should be observed that the mere fact that the enterprise has as its purpose a "pornography business" (presumed initially to be protected expression) does not mean that a RICO statute cannot be applied if that business were advanced "by means of a pattern of racketeering activity in which the defendants participated." Cf. (United States v. Thevis, 474 Fed. Supp. 134 at 140 (N.D. Ga. 1979) 665 F.2d 616, at 621, cert. denied, 459 U.S. 825 (1982). In particular "The indictment specified that both corporations were utilized to 'manufacture "peep show" machines, to sell sexually explicit literature and to distribute

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18. Id. at 3178.

'adult oriented films'" United States v. Thevis, 474 F. Supp. 117 at 126 (N.D. Ga. 1979).

Finally the significance of the Arcara case, as it applies to the petitioner's claims of violation of Vance, Marcus, Books and Freedman, can be gleaned from the vigorous dissent in Arcara when Justices Blackmun, Brennan and Marshall complain that

> "Until today, the Court has required States to confine any book banning to materials that are determined through constitutionally approved procedures, to be obscene. See Marcus...Freedman.... Until to-day, States could enjoin the future dissemination of adult fare as a nuisance only by 'adhering to more narrowly drawn procedures than is necessary for the abatement of ordinary nuisance' See Vance...." (106 S.Ct. 3180).

Amicus quotes the dissent (without agreeing with its sentiments or conclusions) but only to further indicate the inapplicability of Vance, Marcus and Freedman to the case at bar.

CONCLUSION

- For all of the above, the decisions of the Indiana Courts should be affirmed.

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Respectfully submitted,

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